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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION**

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|---|---|
| W.V.G., a minor,<br>by his father, guardian, and next friend,<br>William V. Graham III,<br><br>Plaintiff,<br><br>vs.<br><br>BILLINGS CLINIC, a corporation,<br>and MAUREEN C. LUCAS, MD,<br><br>Defendants. | Civil Action No. 17-1-BLG-SPW-TJC<br><br>**AMENDED COMPLAINT**<br>**and**<br>**DEMAND FOR JURY TRIAL** |

COMES NOW the Plaintiff, W.V.G., a minor child, by and through William V. Graham III, his father, natural guardian, and next friend, and for his claims against the Defendants alleges as follows:

## COUNT ONE

I.

Plaintiff W.V.G. and his father, natural guardian, and next friend, William V. Graham III, are citizens of the State of Washington.

II.

Defendant **Billings Clinic** is and at all relevant times was a corporation organized and existing under the laws of the State of Montana with its principal place of business in Billings, Yellowstone County, Montana; a citizen of the State of Montana; and, engaged in business in Billings, Montana, as a health care provider and hospital under various assumed business names including “Billings Clinic” and “Billings Clinic Hospital.”

III.

Defendant **Maureen C. Lucas, MD**, is and at all relevant times was an obstetrician employed by Billings Clinic, and a citizen of the State of Montana.

IV.

This Court has jurisdiction of this action by virtue of 28 U.S.C. § 1332 in that the Plaintiff and the Defendants are citizens of different states, and the amount in controversy, without interest and costs, exceeds the sum of $75,000.

V.

At all relevant times, Defendant Billings Clinic was engaged in the business of providing health care and treatment to the public in Billings, Montana, including prenatal obstetrical care and treatment at its clinics, as well as obstetrical, labor, delivery, and pediatric care and treatment at Billings Clinic Hospital, by and through its agents and employees including Defendant Maureen C. Lucas, MD, other physicians, nurses, and other health care providers and personnel, all of whom were acting within the course and scope of their employment/agency; and, Billings Clinic is vicariously liable for the negligent acts/omissions of its agents/employees, and the consequent injuries and damages to Plaintiff, described below.

VI.

W.V.G.'s mother, Miriette Graham, was admitted to Billings Clinic Hospital in labor on the morning of September 23, 2007, for obstetrical, labor, delivery, pediatric, and other health care and treatment in connection with the imminent birth of her full-term baby, W.V.G.; and, Dr. Lucas, a board-certified obstetrician, was the attending obstetrician for Miriette Graham and her unborn son.

VII.

The labor continued for approximately 14 hours from admission on the morning of September 23rd and into the early morning of September 24, 2007, when W.V.G. was delivered at 12:30 a.m.

VIII.

As the labor continued into the evening and nighttime hours of September 23rd, W.V.G. began suffering from inadequate oxygenation, which progressed to fetal distress that night and into the early morning of September 24th, which was or should have been apparent to and recognized by the attending nurses and Dr. Lucas by virtue of non-reassuring and concerning fetal heart monitor (FHM) tracings.

IX.

The Defendants deviated from applicable standards of care and were careless and negligent in providing health care and treatment for W.V.G. and his mother during the labor, delivery, and/or early post-partum period.

X.

Without limiting the generality of the foregoing, the Defendants failed to meet applicable standards of care and were careless and negligent in multiple respects during the labor, delivery, and/or early post-partum period, including but not limited to the following:

A. The attending nurses and Dr. Lucas should have recognized, and should have timely and adequately responded to, increasingly concerning and non-reassuring FHM tracings during the last several hours of the labor (including but not limited to FHM and tocodynamometer tracings indicating decelerations with late onsets, progressive increases and wide fluctuations in the baseline fetal heart rate, and other indications of fetal hypoxia and distress), but failed to do so;

B. Dr. Lucas should have ordered and performed a C-section delivery by 11:00 p.m., and no later than 11:30 p.m., on the night of September 23, 2007, but failed to do so, and instead negligently delayed until the baby was in fetal distress and then made multiple unsuccessful attempts at vacuum-delivery;

C. Given Dr. Lucas's failure to order and proceed with a timely C-section delivery, the attending nurses should have advocated for the baby and pursued chain-of-command procedures to provide for the safe management of the labor and a timely C-section delivery, but failed to do so;

D. In light of the non-reassuring FHM tracings and clear indications of fetal hypoxia and distress, Dr. Lucas and/or the attending nurses should have arranged for a pediatrician and/or specialized personnel to be present at the time of delivery to immediately undertake and manage resuscitation procedures, but failed to do so;

E. The Defendants failed to adopt, implement, enforce, and/or conform to hospital standards, guidelines, rules, policies, and procedures;

F. Defendant Billings Clinic failed to adequately train its obstetrical nursing staff in fetal heart monitoring to enable them to recognize non-reassuring FHM tracings and fetal distress, to know when to question a physician's judgment and advocate on behalf of their patients, including the unborn baby, and if necessary to invoke the chain-of-command, all in order to protect the safety and well-being of both mother and baby; and/or;

G. The Defendants otherwise deviated from applicable standards of care and were careless and negligent in providing health care and treatment under the circumstances.

XI.

As a result of the Defendants' carelessness, negligence, and departures from applicable standards of care during the labor, delivery, and/or early post-partum period, W.V.G. suffered serious bodily injuries, including hypoxic brain damage, and has suffered and will suffer physical pain and discomfort, physical impairment and disability, emotional distress, diminished quality of life, diminished ability to enjoy life, diminished ability to pursue various occupational and recreational activities, and losses of income and income capacity; and, has incurred and will incur considerable expenses for health care, personal care, assistance, equipment, and living arrangements; has undergone and will have to undergo various medical procedures, treatments, and therapies; and has been and will be otherwise harmed, injured, and damaged, all to his past and future economic and non-economic damage in amounts to be determined herein.

XII.

All conditions precedent have occurred or been performed, including the processing to completion of an application for review of claim before the Montana Medical-Legal Panel.

**COUNT TWO**

XIII.

Plaintiff re-alleges the allegations of paragraphs I through XII, above, and incorporate same herein by reference as though fully set forth.

XIV.

Plaintiff challenges the constitutionality of §§ 25-9-411 and 25-9-412 of the Montana Code Annotated, and seeks judgment declaring that § 25-9-411, MCA *(which purports to limit the total award for non-economic damages to plaintiffs to $250,000 and require reduction of jury awards exceeding $250,000 in malpractice actions against certain health care providers)*, and § 25-9-412, MCA *(which purports to require courts to order periodic payments rather than lump-sum payments to plaintiffs in malpractice actions against certain health care providers upon request of the tortfeasor(s) when $50,000 or more of future damages are awarded against them)* are unconstitutional, void, and violate the Montana Constitution for various reasons, including but not necessarily limited to the following grounds applicable to each and/or both statutes:

A. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the right to trial by jury guaranteed by Article II, § 26 of the Montana Constitution;

B. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the right to full legal redress guaranteed by Article II, § 16 of the Montana Constitution;

C. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the right to substantive due process guaranteed by Article II, § 17 of the Montana Constitution.

D. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the right to equal protection guaranteed by Article II, § 4 of the Montana Constitution.

E. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the prohibition contained in Article II, § 31 of the Montana Constitution against laws purporting to grant special privileges or immunities.

F. The arbitrary limitations and restrictions on the recovery and payment of damages in §§ 25-9-411 and 25-9-412, MCA, violate the principle of separation of powers established by Article III, § 1 of the Montana Constitution.

WHEREFORE, the Plaintiff demands judgment against the Defendants for all past and future economic and non-economic damages to which he is entitled under the circumstances in amounts to be determined herein, together with prejudgment interest thereon to the extent allowed by law and his costs of suit; demands judgment declaring that §§ 25-9-411 and 25-9-412, MCA, are unconstitutional, void, ineffective, and without force of law to limit or restrict Plaintiff's recovery of and/or the payment of damages; and, requests such other and further relief as the Court may deem to be fair and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

DATED this 10th day of March, 2017.

**GRUBBS LAW OFFICE, PLLC**

By: *_/s/ Larry G. Grubbs_*
Larry G. Grubbs
***Co-Counsel for Plaintiff***

**EISELEIN LAW FIRM, PLLC**

By: *_/s/ Michael G. Eiselein_*
Michael G. Eiselein
***Co-Counsel for Plaintiff***

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 10th day of March, 2017, a copy of the foregoing *AMENDED COMPLAINT and DEMAND FOR JURY TRIAL* was served on all opposing counsel of record as follows:

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*/s/ Larry G. Grubbs*